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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN CARLOS RUIZ,

Defendant and Appellant.

H033380

(Santa Clara County

Super. Ct. No. BB727032)

Defendant Juan Carlos Ruiz pleaded guilty to driving with a blood alcohol level of .08 percent or more and causing bodily injury to another (Veh. Code, § 23153, subd. (b)),¹ two counts of evading a pursuing peace officer and causing serious bodily injury (§ 2800.3), and two counts of failing to stop at the scene of an injury accident (§ 20001, subs. (a) & (b)(1)). He also admitted personally inflicting great bodily injury (Pen. Code, § 12022.7, subd. (a)) on two persons in the commission of the section 23153 offense. Defendant entered his pleas and admissions in exchange for dismissal of two additional counts and a promise that his prison sentence would not exceed six years. The trial court imposed a six-year sentence composed of a three-year upper term for the section 23153 offense and a consecutive three-year term for one of the Penal Code section 12022.7, subdivision (a) enhancements. The court imposed concurrent terms for

¹ Further statutory references are to the Vehicle Code unless otherwise noted.

the remaining counts, and struck the second Penal Code section 12022.7, subdivision (a) enhancement.

Defendant raises three issues on appeal: (1) there was no factual basis for his guilty plea to more than one count of violating section 2800.3, or for his plea to more than one count of violating section 20001; (2) the trial court violated Penal Code section 654 by imposing multiple punishments; and (3) defense counsel was prejudicially deficient during plea negotiations and the taking of the plea. We agree that defendant's pleas to one of the section 2800.3 and one of the section 20001 counts lacked any basis in fact, and that Penal Code section 654 precludes imposing punishment for both the section 23153 and section 2800.3 convictions.

I. Factual Background²

Shortly after midnight on May 6, 2007, Palo Alto police stopped defendant for driving without headlights. His eyes were bloodshot and watery, and a strong odor of alcohol emanated from the interior of the black Mercedes he was driving. Asked to provide identification, defendant suddenly sped away. The officers pursued him, estimating his speed at 80 miles per hour before they lost sight of him and ended the chase.

A few minutes later, different officers came upon a Toyota Yaris resting on its roof in the center median of El Camino Real in Palo Alto. The Toyota's two occupants were trapped inside, very seriously injured. A witness reported that a speeding black Mercedes had rear-ended the Toyota, causing it to skid out of control and roll over several times. The Mercedes had continued on, swerving back and forth across all three lanes before colliding with the center divide and coming to a stop two blocks later.

² As defendant waived his right to a preliminary examination, the facts are taken from the police and probation reports.

Defendant had abandoned the car and fled on foot. He was found more than a mile away an hour and a half later, barefoot, intoxicated, and attempting to flag down other vehicles. He told officers his car been hit by a white guy in a white truck bearing a Confederate flag. After the officers who had earlier pursued him identified him as the driver of the black Mercedes, he was transported to the county jail. His blood alcohol level was .17 percent.

II. Procedural Background

Defendant was charged by felony complaint with driving under the influence of alcohol and drugs and causing bodily injury to another (§ 23153, subd. (a)) (count 1), driving with a blood alcohol level of .08 percent or more and causing bodily injury to another (§ 23153, subd. (b)) (count 2), two counts of evading a pursuing peace officer and causing serious bodily injury (§ 2800.3) (counts 3 and 4), two counts of failing to stop at the scene of an injury accident (§ 20001, subds. (a) & (b)(1)) (counts 5 and 6), and misdemeanor possession of marijuana (Health & Saf. Code, §11357, subd. (b)) (count 7). It was also specially alleged that he personally inflicted great bodily injury (Pen. Code, §§ 1203, subd. (e)(3), 12022.7, subd. (a)) on two victims in the commission of counts 1 and 2, and that the offenses charged in counts 3 and 4 were serious felonies. (Pen. Code, §§ 667, 1192.7.)

Defendant waived his right to a preliminary examination. He pleaded guilty to counts 2 through 6 and admitted all of the special allegations in exchange for a six-year sentence cap and dismissal of counts 1 and 7. At the sentencing hearing, the district attorney sought a six-year term, and defense counsel argued for a four-year, four-month term. The trial court imposed a six-year sentence composed of (1) a three-year upper term for the section 23153 offense, “because [defendant] was on probation for a D.U.I. offense . . . and because he caused great bodily injury to Mr. Edwards”; (2) a consecutive three-year enhancement under Penal Code section 12022.7, subdivision (a) based on

great bodily injury inflicted on Mr. Ting; (3) concurrent three-year lower terms for the two section 2800.3 offenses, and (4) concurrent two-year middle terms for the two section 20001 offenses. Defendant filed a timely notice of appeal and obtained a certificate of probable cause.

III. Discussion

A. Factual Basis

Relying on *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345 (*Wilkoff*), defendant contends that since there was only one incident of evading police and only one incident of failing to stop at an injury accident, there was no factual basis for his guilty pleas to a second count of violating section 2800.3 and a second count of violating section 20001. The Attorney General concedes the facts support only one section 20001 violation. He contends, however, that there is a factual basis supporting defendant's pleas to two counts of violating section 2800.3. Defendant's attempt to evade police seriously injured two victims, the Attorney General argues, and that shows "defendant acted with the requisite wantonness to justify the application of *Neal* [*v. State of California* (1960) 55 Cal.2d 11 (*Neal*)],” which permits multiple punishment in certain circumstances. We disagree.

Before accepting a defendant's guilty plea to a felony charge, a trial court must “cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.” (Pen. Code, § 1192.5.) The latter rule requires the court to “garner information regarding the factual basis either from the defendant or defense counsel.” (*People v. Holmes* (2004) 32 Cal.4th 432, 442 (*Holmes*)). The court need only establish a prima facie factual basis for the plea. (*Ibid.*) It can do so by questioning the defendant or by asking defense counsel to stipulate that a particular document, “such as a complaint, police report, . . . [or] probation report, . . .” provides a factual basis. (*Id.* at p. 436.) Such a stipulation satisfies Penal Code section 1192.5 only if the document referred to actually includes the requisite factual support for

the plea. (*Holmes*, at p. 444.) “[A] trial court possesses wide discretion in determining whether a sufficient factual basis exists for a guilty plea” and its acceptance of that plea will be reversed only for abuse of discretion. (*Id.* at p. 443.)

Here, the parties stipulated that the “traffic collision report” provided a factual basis for defendant’s guilty pleas. That report reflects that after police pulled defendant over for driving without headlights, he suddenly sped away. The officers pursued him, but ended the chase when they lost sight of him. The report further reflects that a few minutes later, defendant crashed into the back of the Toyota, seriously injuring its two occupants.

In *Wilkoff*, the California Supreme Court held that where a single act of driving under the influence in violation of Penal Code section 23153 results in injury to several persons, the facts support charging “only one count of felony drunk driving (i.e., one count of § 23153, subd. (a) and one count of subd. (b))” (*Wilkoff*, *supra*, 38 Cal.3d at p. 349.) “Defendants are not chargeable with a greater *number* of offenses simply because the injuries proximately caused by their single offense are greater.” (*Id.* at p. 352.) Multiple counts of violating a statute are appropriate “only where the actus reus prohibited by the statute—the gravamen of the offense—has been committed more than once.” (*Id.* at p. 349.) That was not the case in *Wilkoff*, where a single act of drunk driving caused a four-car collision that killed one person and injured five others. (*Ibid.*) *Wilkoff* was properly charged with one count of vehicular manslaughter, since the gravamen of that offense is homicide. (*Id.* at pp. 349-350.) But she could not be charged with six counts of violating section 23153, subdivision (a), because the gravamen of that offense is not causing bodily injury but instead, “the act of driving a vehicle while intoxicated and, when so driving, violating any law relating to the driving of a vehicle.” (*Id.* at p. 349.)

As defendant notes, the gravamen of the section 2800.3 offense is evading a pursuing officer with the specific intent to do so. (§ 2800.1) Here, the record reflects

only one such act of evasion. The record does not contain a factual basis for defendant's guilty pleas to more than one count of violating section 2800.3. (*Wilkoff, supra*, 38 Cal.3d at p. 353.)

The Attorney General argues that *Wilkoff* is not controlling. Relying on *Neal*, he contends that two counts of violating section 2800.3 are appropriate where, as here, a defendant evades pursuing officers with wanton disregard for the safety of other drivers and bystanders.

The Attorney General's reliance on *Neal* is misplaced. The defendant in that case was charged with one count of arson and two counts of attempted murder after he threw a Molotov cocktail into a bedroom, severely burning the couple inside. (*Neal, supra*, 55 Cal.2d at p. 15.) The California Supreme Court held that Penal Code section 654 did not preclude his conviction on two counts of attempted murder because Penal Code section 654 does not apply where a single act has two results, "'each of which is *an act of violence* against the person of a separate individual.'" (*Neal*, at pp. 20-21, italics added.) Nor did Penal Code section 654 preclude the imposition of consecutive sentences in *Neal*, because "[a] defendant who commits *an act of violence* with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person." (*Id.* at p. 20, italics added.) As defendant correctly points out, *Neal*'s multiple-victim exception does not apply here, because evading a pursuing officer is not a crime of violence. (*People v. Garcia* (2003) 107 Cal.App.4th 1159, 1164.)

We find no factual basis in the record for defendant's plea to a second count of violating section 2800.3. We accept the Attorney General's concession that there is no factual basis in the record for defendant's plea to a second count of violating section 20001. (*People v. Newton* (2007) 155 Cal.App.4th 1000, 1002-1004.) We conclude that the trial court abused its discretion when it accepted those pleas.

The question of an appropriate remedy remains. In *People v. Willard* (2007) 154 Cal.App.4th 1329 (*Willard*), a defendant pleaded no contest to lewd conduct on a child under 14 and agreed to be sentenced to the upper term of eight years in exchange for dismissal of the remaining charges against him. (*Id.* at p. 1332.) Without designating any particular document, the parties entered into a general stipulation that there was a factual basis for the plea, and the trial court so found. (*Ibid.*) The Court of Appeal held that the plea lacked an adequate factual basis, and the trial court abused its discretion in accepting it. (*Id.* at p. 1335.) The court remanded the matter, directing the trial court to give the defendant the opportunity to withdraw his plea in the event the prosecution could not establish a factual basis for it. (*Id.* at pp. 1335-1336.)

Here, where the Attorney General does not argue or suggest the existence of additional facts that could support defendant's pleas to the second section 2800.3 and 20001 counts, it would serve no purpose to give the prosecution an opportunity, on remand, to establish a factual basis for those pleas. The only appropriate remedy is to afford defendant the opportunity to withdraw his pleas and admissions.³ This will necessarily negate the plea bargain.

B. Penal Code Section 654

Defendant claims the trial court violated Penal Code section 654 in two ways: (1) by using "the same injury" in "the same transaction" to impose punishment for both the section 23153 and section 2800.3 convictions, and (2) by imposing punishment for both the section 2800.3 and 20001 convictions, which he claims were committed as part of an

³ Having concluded that defendant must be given an opportunity to withdraw his pleas and admissions, we need not address his final contention on appeal: that defense counsel was prejudicially deficient in miscalculating the maximum exposure for his crimes and advising him to plead guilty to "offenses that were a legal impossibility."

indivisible transaction with a single criminal objective.⁴ The Attorney General responds that defendant's claims are procedurally barred and substantively meritless. Because defendant may elect not to withdraw his pleas and admissions, we address his Penal Code section 654 contention. We begin with the potentially dispositive procedural point.

1. California Rules of Court, rule 4.412(b)⁵

The Attorney General argues that rule 4.412(b) bars defendant from challenging his sentence under Penal Code section 654. Rule 4.412(b) states that “[b]y agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654’s prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record.”

In *People v. Hester* (2000) 22 Cal.4th 290 (*Hester*), the California Supreme Court held that former rule 412(b), which contained the same wording as present rule 4.412(b), barred the defendant from an appellate challenge to the trial court’s imposition of a term concurrent to the “‘four-year prison [sentence], top/bottom’” the defendant had agreed to. (*Id.* at pp. 294-296.) The court explained that “[t]he rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process.” (*Id.* at p. 295.)

Rule 4.412(b) applies only where the plea bargain contemplates a *specified* prison term. As the high court explained in an analogous context in *People v. Buttram* (2003) 30 Cal.4th 773, “[w]hen the parties negotiate a *maximum* sentence, they obviously mean something different than if they had bargained for a *specific* or *recommended* sentence.

⁴ Defendant also contends the court erred by imposing a great bodily injury enhancement on the section 2800.3 conviction. The record does not reflect a great bodily injury enhancement for either section 2800.3 conviction.

⁵ Further rule references are to the California Rules of Court.

By agreeing only to a maximum sentence, the parties leave unresolved between themselves the appropriate sentence within the maximum.” (*Buttram*, at p. 785; see also *People v. French* (2008) 43 Cal.4th 36, 49 [“In the present case, defendant did not agree that a specified sentence would be imposed; his plea agreement contemplated that the trial court would have discretion to impose any appropriate sentence up to the maximum of 18 years’ imprisonment.”].)

Here, unlike in *Hester*, defendant’s plea bargain did not include a *specified* prison term. Instead, defendant agreed to plead guilty in exchange for a six-year sentence “top” and dismissal of counts 1 and 7. Defendant thus reserved his right to argue for the lowest possible sentence that could be imposed after his pleas to counts 2 through 6. While defendant did not raise a Penal Code section 654 contention at sentencing, “[o]rdinarily, a [Penal Code] section 654 claim is not waived by failing to object below.” (*Hester*, *supra*, 22 Cal.4th at p. 295.) We conclude that rule 4.412 does not bar defendant’s Penal Code section 654 argument on appeal.

People v. Nguyen (1993) 13 Cal.App.4th 114 (*Nguyen*) and *People v. Cole* (2001) 88 Cal.App.4th 850 (*Cole*), cited by the Attorney General without further explanation, do not compel a different conclusion. Both cases are distinguishable. In *Nguyen*, rule 4.412(b) barred the defendant’s Penal Code section 654 challenge to his sentence because, “[d]espite some ambiguity in the language and circumstances,” the defendant had entered into a bargain “for a sentence certain.” (*Nguyen*, at p. 122.) Rule 4.412(b) likewise barred defendant’s Penal Code section 654 challenge in *Cole*. (*Cole*, at pp. 872-873.) In that case, the defendant faced a prison term of 75 years to life. With the concurrence of the prosecutor, the trial court in *Cole* agreed that it would not sentence the defendant to more than one 25-years-to-life term. (*Id.* at p. 854.) The court stated that it would also consider striking one or more of the defendant’s prior serious or violent felony convictions. (*Ibid.*) The court ultimately declined to strike the priors, and the defendant challenged that decision on appeal. (*Id.* at p. 872.) In rejecting the defendant’s

Penal Code section 654 challenge, the Second District Court of Appeal treated the plea bargain as an agreement to “‘a *specified prison term* by and through counsel.’” (*Cole*, at p. 872, italics added.) We view *Cole* in the same light. Neither *Nguyen* nor *Cole* supports the Attorney General’s argument that rule 4.412(b) bars defendant from challenging his sentence under Penal Code section 654.

2. The Merits

Defendant argues that the trial court violated Penal Code section 654 by imposing punishment for both the section 23153 and section 2800.3 convictions, in effect using “the same injury” in “the same transaction” to punish him for two different offenses.⁶ We agree.

Penal Code section 654 provides in pertinent part that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (Pen. Code, § 654, subd. (a).) The section prohibits multiple punishment for a single act or an indivisible course of conduct. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) “‘Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’” (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, quoting *Neal*, *supra*, 55 Cal.2d at p. 19.)

⁶ In his opening brief, defendant contended that the court violated Penal Code section 654 by imposing punishment not only for both the section 23153 and section 2800.3 convictions but for the section 20001 conviction as well, in effect using “the same injury” in “the same transaction” to punish him for *three* different offenses. In his reply brief, he concedes that he could properly be punished for both the section 23153 and section 20001 convictions. (*People v. Butler* (1986) 184 Cal.App.3d 469, 473.)

The trial court's implicit or explicit determination that a defendant maintained multiple criminal objectives is a question of fact that must be upheld if supported by substantial evidence. *People v. Osband* (1996) 13 Cal.4th 622, 730.) “[W]e review the trial court's conclusions of law de novo. [Citation.]” (*People v. Moseley*, 164 Cal.App.4th 1598, 1603.)

Here, the trial court imposed separate punishments for defendant's convictions under sections 23153 and 2800.3, impliedly finding that his act of driving under the influence and causing injury was divisible from his act of evading police and causing injury. The record lacks sufficient evidence to support that finding. There was only one injury-producing collision here. Since sections 23153 and 2800.3 both require proof of injury, defendant's intent and objective when each offense was committed—that is, at the time of the injury-producing collision—is therefore key. If defendant committed the two crimes incident to a single intent and objective, Penal Code section 654 precludes multiple punishments. If he committed the two crimes incident to *separate* intents and objectives, however, Penal Code section 654 does not preclude multiple punishments.

We find nothing in the record to suggest that defendant's objective at the time of the injury-producing collision was anything other than to evade the police. The record compels a finding that both crimes were committed incident to a single objective. Defendant's indivisible act of causing injury by crashing into the Toyota while simultaneously driving under the influence and attempting to evade police can, therefore, be punished under section 23153 or under section 2800.3, but not under both sections. The trial court erred in imposing a three-year term for the section 23153 conviction and a concurrent three-year term for the section 2800.3 conviction. Penal Code section 654 requires that the section 2800.3 punishment be stayed.⁷

⁷ Defendant also contends the trial court violated Penal Code section 654 by imposing punishment for both the section 2800.3 and section 20001 offenses, which he claims were committed as part of an indivisible transaction with a single criminal

At oral argument, the Attorney General urged that *People v. McFarland* (1989) 47 Cal.3d 798 (*McFarland*) supports the imposition of consecutive sentences here. We disagree. The issue in *McFarland* was whether a defendant who killed one person and seriously injured two others during a single episode of drunk driving could be separately punished for vehicular manslaughter and drunk driving. (*Id.* at p. 800.) The court reiterated the general rule: “‘A defendant may properly be convicted of multiple counts based for multiple victims of a single criminal act . . . where the act prohibited by the statute is centrally an “act of violence against the person.”’” (*Id.* at p. 803.) Because vehicular manslaughter with gross negligence is “[p]lainly” a crime of violence against the person, the court concluded that the defendant could “properly be punished for injury to a separate individual that results from the same incident.” (*Id.* at p. 804, italics added.) This was so even though only one of the statutes described a violent offense. Under *McFarland*, a defendant can be separately punished under different statutes for a single act if (1) one of the statutes has as its central element an act of violence against another, and (2) the offenses harmed different victims. (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1784-1785 [victims of assault with deadly weapon and shooting at occupied building different].) *McFarland* is inapposite here because none of the charged crimes was an “‘act of violence against the person.”’” (*McFarland*, at p. 803.)

IV. Disposition

The judgment is reversed, and the matter is remanded with the direction that defendant be given the opportunity to withdraw his pleas and admissions. Should he elect not to do so, the trial court shall stay, pursuant to Penal Code section 654, the concurrent terms imposed for defendant’s convictions on the two section 2800.3 counts.

objective. Since we are directing the trial court to stay the punishment on the section 2800.3 count in the event defendant elects not to withdraw his pleas and admissions, the issue defendant raises is moot.

Mihara, J.

I CONCUR.

McAdams, J.

I CONCUR IN THE JUDGMENT ONLY.

Bamattre-Manoukian, Acting P. J.